



NO. 90-806

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

**CITY OF WILCOX, ARIZONA, ARIZONA
ELECTRIC POWER COOPERATIVE, INC.,
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., AMERICAN PUBLIC
GAS ASSOCIATION, and ASSOCIATED
GAS DISTRIBUTORS.**

Petitioners,

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

**BRIEF OF PRODUCER RESPONDENTS
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether a Commission regulation authorizing automatic pregranted abandonment of a customer's firm transportation service at the end of its contract with the transporting pipeline constitutes deregulation of abandonments in contravention of Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b).
2. Whether Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), permits the Commission to prescribe in advance and on a generic basis the conditions under which the abandonment of services will be authorized, rather than requiring case-by-case adjudication.

PARTIES TO THE PROCEEDING

To supplement the list of parties provided in the Petition, and in compliance with this Court's Rule 29.1, Respondents submit a complete list of their companies, parent companies and subsidiaries which are not wholly owned subsidiaries, in Appendix A attached hereto.

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**BRIEF OF PRODUCER RESPONDENTS
IN OPPOSITION**

SUMMARY OF STATUS OF THIS CASE

This Court's decision in *Mobil Oil Exploration & Producing Southeast Inc., et al. v. United Distribution Companies, et al.* (herein called *Mobil Oil*), Case Nos. 89-1452 and 89-1453, issued January 8, 1991, dooms this Petition. Question No. 2 raised by Petitioners is, as they allege,¹ the same question raised by the Solicitor General in Case No. 89-1453, and resolved by the Court in his favor, rejecting the Petitioners' position.² Question No. 1 is subsumed in Question No. 2, and the arguments on

1. Petition p. i, note 1; p. 13.

2. *Mobil Oil* slip op. at 13-16.

which it is based are undermined by the Court's reasoning rejecting similar arguments by Respondents in *Mobil Oil*, many of whom joined in the Petition here. To the extent that the decision below may be distinguishable from Order 451, which was sustained in *Mobil Oil*, the issue is not ripe for review, as the D.C. Circuit remanded the question of the exercise in the context here of the Commission's power to allow pregranted abandonments.³ On this issue the D.C. Circuit Opinion as to which review is sought⁴ is merely interlocutory, and certiorari does not lie.⁵

Finally, in their Brief to the court of appeals, Petitioners conceded that the Commission has jurisdiction to approve pregranted abandonment by generic rule, and are therefore precluded from raising it here.

REASONS FOR DENYING PETITION

Since the filing of the Petition in this case on November 21, 1990, the Court issued its opinion in *Mobil Oil* on January 8, 1991. That decision is controlling on the issues raised in the Petition for Certiorari in this case. As Petitioners stated at page 14 of the Petition, in comparing the court of appeals decision below with the Fifth Circuit's decision in *Mobil Oil*:⁶

The power exercised by the Commission in both instances is the same. The statutory foundation for

3. Petition at 14.

4. *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), Pet. app. at 1a-46a; see pp 42a-43a.

5. See court of appeals opinion, Pet. app. at 42a; generally, at 38a-42a. *Brotherhood of Locomotive Firemen v. Bangor & A. RR Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville T&K Ry. Co.*, 148 U.S. 372, 384 (1893).

6. *Mobil Oil Exploration & Producing Southeast Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1989).

the assertion of power, Section 7(b) of the Natural Gas Act, in both instances is the same. Consequently, a decision in the *Mobil* case may have a precedential effect on the decision below.

Producer Respondents agree. The Petition should therefore be denied.

The Petition alleges only two reasons for granting the writ: (1) Section 7(b) of the Natural Gas Act⁷ requires the Commission to inquire into case-specific facts, so the Commission has no jurisdiction to exercise its abandonment authority in advance, in a generic proceeding relying on industry-wide facts;⁸ and, (2) the court of appeals' decision is in conflict with the decision of the Fifth Circuit in *Mobil Oil Exploration & Producing Southeast v. FERC*⁹, and this Court's opinion in *United Gas Pipe Co. v. McCombs*.¹⁰

This Court discussed Petitioner's arguments in the *Mobil Oil* case, and held:

[W]e reject the suggestion that this provision [Section 7(b) of the NGA] mandates individualized proceedings involving interested parties before specific abandonment can take place. (Slip op at 13.)

[N]othing in § 7(b) prevents the Commission from giving advance approval of abandonment. *FPC v. Moss*, 424 U.S. 494, 499-501 (1976). (Slip op. at 14.)

7. 15 U.S.C. § 717f(b).

8. Petition at 9-10.

9. See note 6.

10. 442 U.S. 529 (1979). See Petition at 11-12. The *Mobil Oil* court distinguished *McCombs* on the grounds that that case dealt with an attempted abandonment "with no Commission approval, finding, or hearing whatsoever," see slip op. at 16.

Contrary to respondents' theory, § 7(b) does not compel the agency to make "specific findings" with regard to every abandonment when the issues involved are general. (Slip op. at 15.)

Before promulgating Order No. 451, the agency held both a notice and comment hearing and an oral hearing. As it correctly concluded, § 7(b) required no more. Time and again, "[t]he Court has recognized that even where the agency's enabling statute requires it to hold a hearing, the agency may rely on its rule-making authority to determine issues that do not require case-by-case consideration. (Slip op. at 15.)

Petitioners pointed out that Question No. 2 raised in their Petition is identical to that raised by the Solicitor General in the *Mobil Oil* case.¹¹ The Fifth Circuit opinion in *Mobil Oil*¹² answered the question in the negative (Petition at 13.) The across-the-board reversal of the Fifth Circuit's decision in *Mobil Oil*¹³ leaves no room for doubt that the Petition should be denied as to Question 2.

The only matter which possibly is not resolved by *Mobil Oil* is the scope of the Commission's power to issue the Orders below in the context of the facts of this case. This is the issue presented in Question No. 1, and is in part existence of jurisdiction and in part exercise of jurisdiction. to the extent it is directed to the existence of the Commission's jurisdiction, it is subsumed in Question No. 2 and decided by *Mobil Oil* adversely to Petitioners. To the extent it is directed to the exercise of the Commission's jurisdiction, it has been remanded by the court of appeals and is therefore not ripe for certiorari.

11. See note 1, of Petition; also p. 13 of Petition.

12. *Mobil Oil Exploration & Producing Southwest v. FERC*, 885 F.2d 209 221-223. (1989).

13. Slip op. at 8, 13-16, 18.

On the issue of the application of the Commission's powers in the context of this proceeding, Petitioners prevailed in the court of appeals, and the Orders were remanded for reconsideration and an adequate explanation of "how pregranted abandonment trumps another basic precept of natural gas regulation-protection of gas customers from pipeline exercise of monopoly power through refusal of service at the end of a contract period."¹⁴ The court of appeals refused to set aside the regulation (18 C.F.R. § 284.221(d)) as all parties agreed that it had some application, but required the Commission to issue a final rule addressing the matter within 90 days (on or before February 13, 1991).¹⁵ Therefore, on this issue the court of appeals' decision is merely an interlocutory order, not reviewable on certiorari.¹⁶

In addition to the remand ordered by the court of appeals, consumers have other opportunities in cases before the Commission in which they can assert that the generic rule should not be applied to them. The Commission has preserved a "safety valve" to protect customers in the event the customer is unable to obtain a "rollover" transportation agreement at the time the initial transportation agreement expires. The customer can raise

14. See court of appeals opinion, Pet. app. at 42a-43a; generally, at 38a-42a.

15. Producer Respondents take the position that while the Commission clearly has jurisdiction to order pregranted abandonment as provided in the Orders below, whether the Commission *should* issue such an order under the facts here as a matter of policy is in doubt, and take no position on this question.

16. *Brotherhood of Locomotive Firemen v. Bangor & A. RR Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville T&K Ry Co.*, 148 U.S. 372, 384 (1893); see also R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 225 (6th Ed. 1986).

the issue in a general rate case involving the pipeline transporter, in a proceeding in which the pipeline seeks to impose a gas inventory charge, or in a complaint proceeding brought by the customer under 18 C.F.R. § 385.206.¹⁷

In *Mobil Oil*, the Court found that purchasers objecting to the application of the abandonment rule to their particular circumstances could object by filing a complaint with the Commission under 18 C.F.R. § 385.206 (1986).¹⁸ As the Commission specifically recognized this right in the Orders below,¹⁹ the use of the complaint procedure as a "safety valve" prevents any claim by Petitioners that they will not have an adequate opportunity to present their particular circumstances to the Commission as grounds for their exclusion from the general rule.

In *Permian Basin Area Rate Cases*,²⁰ this Court found that the existence of a "special relief" provision operated to save general rules prescribed by the Commission which might operate against a particular producer in a confiscatory manner. In *Heckler v. Campbell*,²¹ this Court sustained general guidelines, as long as a particular claimant could offer evidence that the guideline should not apply to him.²² Thus the promise of the Commission²³ to

17. See Order 500-I, Pet. app. at 311a-313a; generally at 309a to 330a.

18. Slip op. at 16.

19. Pet. app. at 312a.

20. 390 U.S. 747, 770-772 (1968).

21. 461 U.S. 458 (1983).

22. *Id.* at 467; accord, *FPC v. Texaco, Inc.*, 377 U.S. 33, 40 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

23. Pet. app. at 312a.

consider in an individual case the refusal of a pipeline to extend the firm transportation agreement (i.e., "obtain a rollover contract") is particularly significant. To the extent that the "safety valve" is inadequate, the issue is not ripe for review, as Petitioners have another opportunity to raise this issue to the Commission on remand from the court of appeals (*see* pp. 4-5, *supra*.)

Petitioners' assertion that Section 284.221(d) does not obligate the pipeline to enter into good faith negotiations with a customer for an extension of the contract's term²⁴ is specious. Instead, the Commission specifically stated in Order 500-I (pp. 311a-313a) that it would consider the *failure* of the pipeline to so negotiate in a complaint proceeding brought by the customer, or might adopt such a provision as a condition to a pipeline's gas inventory charge upon a proper showing by the customer, citing a case in which this issue had already been raised.²⁵

Moreover, in their briefs to the court of appeals, Petitioners conceded Question No. 2. In the proceeding below before the court of appeals, Petitioners conceded in their Joint Initial Brief, on page 8, the following:

It is true that the Commission is not foreclosed from acting by general rule to adopt a "procedure under which pregranted abandonment may be authorized in appropriate cases," *FPC v. Moss*, 424 U.S. 494, 501 (1976) (emphasis added by Petitioners) and it can be assumed for purposes of the present argument that with "proper findings supported by sub-

24. Petition at 12 n. 11.

25. Pet. app, at 313a, citing *Transcontinental Gas Pipe Line Corp.*, 46 F.E.R.C. § 61,364 at 62,143-4 (1989); 47 F.E.R.C. § 61,244 at 61,848 (1989).

stantial evidence," *Id.* at 502, the Commission could provide generically for pregranted abandonment of certificated service. Nonetheless, the abandonment decision must rest in the Commission's, not the applicant's control. *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 539 (1979). (emphasis in original)

Referring to the concession quoted above, the court of appeals noted:

[P]etitioners quite rightly, and necessarily, concede that the Commission may decide on abandonment *in advance*, even before service has begun, *see FPC v. Moss*, 424 U.S. 494, 501 (1976), and that it may make such a determination generically, covering an entire class of cases, *see Joint Brief of Indicated LDCs, State Commissions, State Agencies, and End Users, on Issue of Pregranted Abandonment of Firm Service* at 8; *see also AGD I*, 824 F.2d at 1015 n. 7; . . .²⁶ (emphasis in original)

In view of their concession of Question No. 2 in the court of appeals, which accurately predicted this Court's decision in *Mobil Oil*, Petitioners are precluded from raising the same question on certiorari.²⁷

The Court's opinion in *Mobil Oil* resolves in favor of the Commission all of the issues which Petitioners seek

26. Pet. app. 36-37a.

27. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Helvering v. Wood*, 309 U.S. 344, 348-349 (1940); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937); *United States v. L. C. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946); *Kaneb Services v. Federal Sav. & Loan Ass'n*, 650 F.2d 78, 81 (5th Cir. 1981); *Wilson v. Hodel*, 758 F.2d 1369 (10th Cir. 1985).

to raise. To the extent that theses issues are not resolved by *Mobil Oil*, they are not ripe for review, as they will be considered by the Commission pursuant to the remand of the court of appeals. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted.

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APPENDIX A

Following is a list of the Respondents joining in this Brief. Pursuant to Rule 29.1, parent companies and subsidiaries (except wholly owned subsidiaries), if any, are listed under each such Respondent.

AMOCO PRODUCTION COMPANY

Amoco Company (parent)
Amoco Corporation (parent)
East Texas Salt Water Disposal Company
Gravacap, Inc.
Heat Transfer Research, Inc.
Sultran, Ltd.

**ANADARKO PETROLEUM CORPORATION**

(Anadarko Petroleum has no parent corporation or subsidiaries other than those it wholly owns.)

APACHE CORPORATION

Apache Corporation is publicly owned, but has no parent, subsidiary, or affiliated companies which are publicly owned.

ARCO OIL & GAS COMPANY

Atlantic Richfield Company (parent)
85819 Canada Limited
Agro Internacional, S. de R. L. de C. V.
Alyeska Pipeline Service Company
ARCO Channelview, Inc.
ARCO Chemical Company
ARCO China Inc.
ARCO Solar Nigeria Ltd.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty, Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda
Compania Minera Dos Republicas S.A. de C.V.
Cook Inlet Pipe Line Company

Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum Inc.
Lyondell Petrochemical Company
Murlfill Pty. Ltd.
Platte Pipe Line Company
Showa ARCO Sclar Far East Pte. Ltd.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

ASHLAND EXPLORATION, INC.

Ashland Exploration Holdings, Inc. (parent)
(Ashland Exploration, Inc. has no
subsidiaries other than those it wholly owns.)

CHEVRON U.S.A. INC.

Chevron Corporation (parent)
Atlas Supply Company
Felix Oil Company
Pembroke Company, Inc.

CONOCO INC.

E. I. Du Pont De Nemours, Inc. (parent)
Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation
Conch International Methane Ltd.
Conoco Amazonos Limited
Conoco Arabia Limited
Conoco Buton Ltd.
Conoco Cabinda (Angola) Ltd.
Conoco Cegonha (Angola) Ltd.
Conoco Dabaa Ltd.
Conoco El Hamma (Tunisia) Ltd.
Conoco Fagbur Ltd.
Conoco Iraq Ltd.

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Conoco Kayes (Congo) Ltd.
Conoco Kouilou (Congo) Ltd.
Conoco N-dombo (Gabon) Ltd.
Conoco North Ras Qattara Ltd.
Conoco North Sitra Ltd.
Conoco Onango (Gabon) Ltd.
Conoco Peru
Conoco South Umbarka Ltd.
Conoco Spain Ltd.
Conoco Warim Ltd.
Conoco West Ras Qattara Ltd.
Conoco Yemen (Aden) Ltd.
Conoco Yemen (Sanaa) Ltd.
Dubai Exploration Onshore Company
Felix Oil Company
Jupiter Chemicals, Inc.
Kettleman North Dome Association
Oberrbeinisebe Mineraloelwerke
Petrocokes, Ltd.
Petroleum Terminals, Inc.
The Standard Shale Products Company
Tidelands Royalty Trust

EXXON CORPORATION

(Exxon Corporation has no parent corporation.)
Exxon Capital Corporation
Exxon Capital Holdings Corporation
Exxon Capital Ventures Inc.
Exxon Credit Corporation
Exxon Financial Services Company Limited
Exxon Funding B. V.
Exxon Pipeline Company
Exxon Shipping Company
Exxon Supply Company
Imperial Oil Limited
Interhome Energy Inc.
Scurry-Rainbow Oil Limited

HUNT OIL COMPANY

Hunt Consolidated, Inc. (parent)

Portal Pipe Line Company
Poloma Pipe Line Company

KERR-McGEE CORPORATION

Kerr-McGee Corporation has no parent, subsidiary or affiliate companies which are publicly owned.

MARATHON OIL COMPANY

USX Corporation (parent)
Texas Oil & Gas Corporation (parent)
Arctic LNG Transportation Company Kenai
LNG Corporation
Oil Insurance Limited
Polar LNG Shipping Corporation

MAXUS ENERGY CORPORATION

Maxus Energy Corporation is a publicly owned corporation. It has a subsidiary or affiliate, Diamond Shamrock Offshore Partners Limited Partnership, which is also publicly owned. Maxus Energy Corporation has no other parent, subsidiary, or affiliated companies which are publicly owned.

MERIDIAN OIL INC.

Meridian Oil Inc. is a subsidiary of Burlington Resources Inc., a publicly owned corporation. Meridian Oil Inc. has no other parent, subsidiary, or affiliate corporations which are publicly owned.

MITCHELL ENERGY CORPORATION

Mitchell Energy Corporation is a wholly owned subsidiary of Mitchell Energy Development Corporation. Mitchell Energy Corporation has no subsidiaries or affiliate corporations which are publicly owned.

**MOBIL NATURAL GAS INC. and
MOBIL OIL EXPLORATION & PRODUCING
SOUTHEAST, INC.**
Mobil Corporation (parent)
Paloma Pipe Line Company

OXY USA Inc.

Occidental Petroleum Corporation (parent)

(OXY USA Inc. has no subsidiaries other than those it wholly owns.)

IBP, Inc. (affiliate)

PENNZOIL

(Pennzoil Company has no parent corporation.)

Jiffy Lube International, Inc.

PHILLIPS PETROLEUM COMPANY

(Phillips Petroleum Company has no parent corporation.)

Venezoil, C.A.

PHILLIPS 66 NATURAL GAS COMPANY

Phillips Petroleum Company (parent)

Kenai LNG Corporation

Arctic LNG Transportation Company

Polar LNG Shipping Corporation

PLACID OIL COMPANY

Placid Oil Company is a privately owned corporation.

Placid Oil Company has no parent, subsidiary or affiliated companies which are not wholly owned.

ROSEWOOD RESOURCES, INC.

(Rosewood Resources has no parent corporation or subsidiaries other than those it wholly owns.)

SHELL OFFSHORE INC. and

SHELL WESTERN E & P INC.

Shell Offshore, Inc. and Shell Western E&P Inc. are wholly-owned subsidiaries of Shell Energy Resources Inc. which is, in turn, a wholly-owned subsidiary of Shell Oil Company. Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum Inc. which is owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p. l. c., both of which are publicly owned

companies. The following companies are partly-owned subsidiaries or affiliates of Shell Oil Company:

Agipro Biosciences, Inc.
Al Furst Petroleum Company
Butte Pipe Line Company
Catalyst Recovery Europe, S.A.
Cortez Capital Corp.
Cortez Pipeline Company, a Texas partnership
CRI International, Inc.
CRI Far East Trading Co., Ltd.
CRI-SAM, Ltd.
CRI Ventures, Inc.
Criterion Catalyst Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Grande Ecaille Land Company, Inc.
Gravacap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
Lucky Chance Mining Company, Inc.
MESBIC Financial Corporation of Houston
Nippon CRI, Ltd.
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Olympic Pipe Line Company
Pecten Cameroon Company
Pecten Portugal Company S.A.R.L.
Plantation Pipe Line Company
Premix/E.M.S. Inc.
Saudi Petrochemical Company
TIME Safety Products, Ltd.
United Scientific, Inc.
Van Salt Water Disposal Company
West Shore Pipe Line Company

Wolverine Pipe Line Company
Wyoming Industrial Development Corporation

TEXACO INC.

(Texaco Inc. has no parent corporation.)

Getty Oil Company

Texam Cogeneration Company

Texaco Pipeline Inc.

Texaco Exploration and Production Inc.

Texaco Refining and Marketing Inc.

Texaco Trading and Transportation Inc.

Norsk Texaco Oil A/S

S.A. Texaco Belgium N.V.

Texaco A/S

Texaco Britain Limited

Texaco Denmark Inc.

Texaco Investments (Netherlands), Inc.

Texaco (Ireland) Limited

Texaco Limited

Texaco North Sea U.K. Company

Texaco Oil Aktiebolag

Texaco Petroleum Maatschappij (Nederland) B.V.

Refineria Panama S.A.

Refineria Texaco de Honduras, S.A.

Texaco Brasil S.A.—Productos de Petróleo

Texaco Caribbean Inc.

Texaco Nigeria Limited

Texaco Panama Inc.

Texaco Petroleum Company

Texaco Puerto Rico Inc.

Texaco Trinidad, Inc.

Texaco Petroleum Company

Texaco Chemical Company

Texaco International Financial Corporation

Texaco International Trader Inc.

Texaco Overseas Holdings Inc.

Texaco Overseas Petroleum Company

Texaco Overseas Tankship Ltd.

Canada Texaco Inc.

Four Star Oil & Gas Company
Texaco Canada Petroleum Inc.
Texaco Refining and Marketing Holdings Inc.

UNION OIL COMPANY OF CALIFORNIA
d/b/a UNOCAL
Unocal Exploration Partners, Ltd.

UNION PACIFIC RESOURCES COMPANY
Union Pacific Corporation (parent)
CPC Resources Corporation
Golden Spike Indonesia, Inc.
Harbor Service Stations, Inc.
Quality Aggregate Company
Rocky Mountain Energy Company
Union Pacific Arguello Pipeline, Inc.
Union Pacific Australia PTY Ltd.
Union Pacific Energy Company
Union Pacific Fuels, Inc.
Union Pacific Gas Gathering, Inc.
Union Pacific Gas Pipeline, Inc.
Union Pacific Gas Processing Company
Union Pacific International Petroleum Company
Union Pacific Malaysia, Inc.
Union Pacific Minerals, Inc.
Union Pacific Petrochemicals, Inc.
Union Pacific Pipeline Company
Union Pacific Pipeline, Inc.
Union Pacific Refining, Inc.
Union Pacific Resources Inc.
Union Pacific Resources Indonesia, Inc.
Union Pacific Trading Company
UPR (Canada) Ltd.

UNION TEXAS PETROLEUM CORPORATION
Union Texas Petroleum Holdings, Inc. (parent)
Union Texas Exploration Corporation
Union Texas International Corporation